

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VARQUIN ENTERPRISES INC., a New York
corporation,

Plaintiff-counterclaim
defendant,

v.

PERRY PUBLICATIONS LIMITED, a United
Kingdom corporation,

Defendant-counterclaimant

:
:
: Docket No. 07 CV 3953 (LBS)
:
:

:
: **DECLARATION**
: **OF TOBY M.J. BUTTERFIELD**
:
:

:
: **ECF Case**
:
:

I, TOBY M.J. BUTTERFIELD, declare and say:

1. I am a member of Cowan, DeBaets, Abrahams and Sheppard LLP, counsel for defendant Perry Publications Limited ("Perry") in the above-referenced case. I make this declaration of my own knowledge, except where otherwise indicated.

2. I submit this declaration in support of Perry's motion for a preliminary injunction and temporary restraining order.

3. As explained in the accompanying declaration of Julian Gregory dated May 31, 2007 (the "Gregory Dec."), this case concerns magazine publisher Varquin Enterprises, Inc. ("Varquin"), a terminated licensee of magazine publisher Perry's trademarks who brought an action in state court seeking (a) injunctive relief declaring that the license agreement between the parties is still in effect, and (b) some type of prior restraint on Perry's ability to communicate with its business partners about the fact that Perry's license agreement with Varquin terminated.

4. This firm first received Varquin's application to the State court for such relief late in the afternoon on Friday, May 18, 2007, long after the close of business in England,

where Perry is located. On Monday, May 21, we filed a Notice of Removal removing the case to this Court. A copy, omitting its bulky enclosures, is annexed hereto as Exhibit A.

5. Since then, we have had several calls with counsel for Varquin concerning how Varquin intended to pursue this action, and Perry's response thereto. During one such call, on Tuesday May 22, 2007, I asked counsel for Varquin, Mr. Frank Dehn, to confirm to us whether and when his client intended to publish the next edition of BUSINESS TRAVELER magazine (the "Magazine"), as we presumed it was imminent, given Varquin's prior actions, its mistaken position that the License had not terminated, and Varquin's desire for a court order declaring as much, and from the fact that the Magazine had appeared monthly prior to termination.

6. In response, Mr. Dehn did not dispute that Varquin was still in the process of preparing a June edition of the Magazine, or that Varquin might indeed be starting to ship it shortly. Instead, he agreed to check on the precise status of the Magazine and get back to us. We told him that our client obviously needed explicit assurances that Varquin was not about to unleash unauthorized and infringing copies of the Magazine.

7. The next day, Wednesday, May 23, Mr. Dehn said Varquin refused to confirm the status of the June edition. Instead he read us a statement from Varquin which maintained that "it's none of [Perry's] business" whether Varquin would publish a June edition of the Magazine.

8. Varquin is wrong. In fact, it is of critical importance to Perry whether Varquin will engage in such brazen infringement. By agreement dated April 7, 2006 (the "License"), a true and correct copy of which is annexed to the accompanying Declaration of Julian Gregory as Exhibit A, Perry granted to plaintiff Varquin Enterprises, Inc. ("Varquin") the

limited right to publish a North American Edition of Business Traveler magazine during the Term of the License. In Clause ¶ 11.1 of the License, Varquin promised that upon termination of the License, Varquin “shall not thereafter publish or authorize the publication of any publication under the title The Business Traveler or including such title or any title confusingly similar to such title.”

9. As counsel for Varquin refused to confirm that it would honor this promise, we warned that we would be forced to seek immediate injunctive relief if Varquin attempted any unlicensed use of the Marks. On May 25, 2007, we sent to counsel for Varquin a cease-and-desist letter, a true and correct copy of which is attached hereto as Exhibit B. Counsel for Varquin responded in writing that same day, but again failed to respond to Perry’s demands that Varquin acknowledge Perry’s rights to its trademarks and undertake not to exploit them.

10. When we subsequently told Mr. Dehn that he had led us to believe that Varquin was about to publish another edition of the Magazine, he denied having done so, but still refused to confirm that Varquin would refrain from such massive infringement.

11. Indeed, Varquin persists in seeking and processing new subscriptions for the Magazine at the website for the North American Edition via its website. A true and correct copy of Varquin’s subscription page, <http://www.businesstravelerusa.com/subscribe.php>, is attached hereto as Exhibit C. Obviously Varquin could only honor those subscriptions by publishing more editions of the Magazine.

12. In addition, Varquin is also using the Marks throughout www.businesstravelerusa.com, to which consumers and potential advertisers may now be directed when searching for an authorized Business Traveller site. See, for example, the true and correct copy of the main page of that website is attached hereto as Exhibit D. Toward the lower

right of that page is a section called “Advertise with Business Traveler”, which leads to materials designed to attract potential advertisers to Varquin. Below that, and also near the upper right, are links to the subscription page.

13. Furthermore, by their use of Business Traveler email addresses, Varquin employees still hold themselves out as authorized users of the Marks, when in truth and in fact they are not. Visitors who click on the “Contact” link at www.businesstravelerusa.com are directed to <http://www.businesstravelerusa.com/contact.php>, a true and correct copy of which is attached hereto as Exhibit E. It lists contact email addresses for magazine personnel that end with @btusonline.com. (Btusonline.com is presumably short for “Business Traveler United States Online”. As described in the accompanying Declaration Gregory Dec., Perry never authorized Varquin to use this domain name in connection with the Magazine.) On the contact page, the now inaccurately titled “Director, North America” of the North American Edition is listed as Adam Rodriguez with the address adam@btusonline.com. Other infringing examples on that same contact page include subscriptions@btusonline.com, ads@btusonline.com, marketing@btusonline.com, jim@btusonline.com, forrest@btusonline.com and alex@btusonline.com.

14. The existence of the btusonline.com domain itself demonstrates Varquin’s intent to continue to use the Marks and publish the Magazine despite the termination of the License. On May 10, 2007, just days after receiving notice from Perry that the License had terminated, Varquin registered the domain “btusonline.” Attached hereto as Exhibit F is a true and correct copy of the WHOIS data for btusonline.com provided by the domain’s current registrar, Network Solutions, LLC (“Network Solutions”), which confirms this.

15. This registration alone demonstrates that Varquin plans to continue using the Marks, as Perry owns and controls the domain businesstravelerusa.com, and so has the right to switch off that previously authorized domain name at any time, as Varquin is aware. Varquin has strategically copied or linked the entire Business Traveler website to the btusonline.com domain name. Compare Exhibit D (www.businesstravelerusa.com) with Exhibit G, which is a true and correct copy of the website now accessible at www.btusonline.com. They are identical.

16. Varquin obviously plans extensive use of the Marks: Network Solutions—like all domain registrars—allows domains to be registered for a little as one year with the right to renew. Instead of purchasing a short term registration, Varquin chose a 10-year registration, betraying its intention of to keep btusonline.com (and presumably the Mark, which currently appears in the website) through May 10, 2017. Ex. E.

17. By reason of plaintiff Varquin's actions, as described herein, Perry will suffer irreparable harm, absent Court intervention in emergency relief.

18. Although no complaint has been filed as yet, as this case was removed before Varquin could prepare one, Perry has prepared and filed a counterclaim seeking this emergency and other relief, a copy of which is annexed hereto as Exhibit H.

19. No prior application for this or any other similar interim relief has been made by Perry to this or to any other court.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was signed on May 31, 2007 in New York, New York.

Dated: New York, New York
May 31, 2007



TOBY M. J. BUTTERFIELD

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VARQUIN ENTERPRISES INC., a New York
corporation,

Plaintiff,

v.

PERRY PUBLICATIONS LIMITED, a United
Kingdom corporation,

Defendant.

:
:
: SDNY Docket No. 07-cv-3953 (LBS)
:
: NY Supreme Docket No. 07/106,689
:
:
: **NOTICE OF REMOVAL**
:
:
:
: **ECF Case**
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TO THE CLERK OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446,

Defendant Perry Publications Limited ("Perry") hereby removes the above-captioned action to the United States District Court for the Southern District of New York. The grounds for removal of this action are as follows:

1. On May 17, 2007, Varquin Enterprises Inc. ("Varquin") commenced an action against Perry by filing a Summons With Notice and an Order to Show Cause ("OTSC") in the Supreme Court of the State of New York, County of New York, captioned Varquin Enterprises Inc. v. Perry Publications Limited, Index No. 07/106689. Copies of the Summons With Notice and the OTSC and their attachments are attached hereto as Exhibits A and B respectively. Defendant Perry first received a copy of the said documents when they were served by hand upon their undersigned counsel for Perry late on Friday, May 18, 2007.

2. The underlying dispute arises from the termination of a copyright and trademark licensing agreement between defendant magazine publisher Perry and plaintiff

magazine publisher Varquin based on the latter's violations thereof, including failure to make payments required under the agreement. Varquin disputes the validity of the termination. The OTSC forces Perry to treat the license as still in effect, and purports to impose a prior restraint against any statement by Perry concerning the termination to third parties.

3. This action is a civil action of which this court has original jurisdiction under 28 U.S.C. § 1332 and may be removed to this Court by defendant pursuant to 28 U.S.C. § 1441(b) because it is a civil action in which the plaintiff is a New York resident and the defendant is a resident of the United Kingdom, and the amount in controversy exceeds \$75,000. The amount in controversy exceeds \$75,000 because, inter alia:

- a. The action seeks revival of a contract under which a minimum license fee of \$200,000 is unpaid, Agreement ¶ 6.1, and under which additional hundreds of thousands of dollars in cash and in-kind payment may change hands, e.g., Agreement (OTSC, Rodriguez Affidavit, Ex. A) ¶¶ 4.4, 4.5, 4.6, 4.8, 4.10, 4.12, 4.13, 4.14;
- b. The action seeks an injunction against a license termination that could cause the loss of salary of 11 full-time employees, which upon information and belief collectively total over \$75,000 (Rodriguez Affidavit, ¶ 40); and
- c. The action seeks injunctive and declaratory relief which, if granted, would force defendant to license copyrighted materials, license fees for which for the remaining 8 months of 2007 total \$104,000 (Agreement, ¶ 4.4).

4. Alternatively, this Court has original jurisdiction pursuant to 15 U.S.C. § 1121 because this action seeks injunctive and declaratory relief that will determine rights in and to defendant's federal trademarks BUSINESS TRAVELER (USPTO Reg. No. 1372466) and BUSINESS TRAVELER INTERNATIONAL (USPTO Reg. No. 1784071).

5. Alternatively, this Court has original jurisdiction pursuant to 28 U.S.C. § 1338(a) because it seeks injunctive and declaratory relief that would force defendant to continue licensing copyrighted materials to plaintiff. In fact, defendant has terminated plaintiff's license to such materials and now holds the copyright thereto unencumbered by any such license.

6. To the extent that this Notice of Removal is based on general federal question jurisdiction, it is timely under 28 U.S.C. § 1446(b) because counsel for the defendant Perry first received service of the OTSC and the Summons with Notice on May 18, 2007. This Notice of Removal is being timely filed within 30 days of the receipt of the OTSC and Summons With Notice.


7. In accordance with 28 U.S.C. § 1446(d), a true and correct copy of this Notice of Removal is being filed promptly with the Clerk of Court for the Supreme Court of the State of New York, County of New York, and notice of same is being given to counsel for plaintiff.

8. Defendant Perry reserves the right to amend or supplement this Notice of Removal.

WHEREFORE, the defendant Perry states that this Court has original jurisdiction of the action pursuant to 28 U.S.C. § 1331, and that this action is properly removable from the Supreme Court of the State of New York, County of New York, to this Court.

Dated: May 21, 2007
New York, New York

COWAN DeBAETS ABRAHAMS
& SHEPPARD, LLP

By 
Toby M.J. Butterfield (TB-8599)
Nancy E. Wolff (NW-7508)
Mason A. Weisz (MW-5954)

41 Madison Avenue, 34th Floor
New York, New York 10010
Telephone: (212) 974-7474
Facsimile: (212) 974-8474

*Attorneys for defendant Perry Publications
Limited*

EXHIBIT B

COWAN, DeBAETS, ABRAHAMS & SHEPPARD LLP

ATTORNEYS AT LAW

FREDERICK P. BIMBLER
TOBY M. J. BUTTERFIELD
AL J. DANIEL, JR.*
TIMOTHY J. DeBAETS
ROBERT I. FREEDMAN
ELLIS B. LEVINE
MITCHELL E. RADIN
ROBERT L. SEIGEL
J. STEPHEN SHEPPARD
RALPH J. SUTTON*
KENNETH N. SWEZEY
DAVID BRUCE WOLF
NANCY E. WOLFF

ZEHR A. J. ABDI
LISA K. DIGERNES
MATTHEW A. KAPLAN^c
M. KILBURG REEDY
MASON A. WEISZ

PHILIP M. COWAN (1943-2001)
HOWARD ABRAHAMS (1945-1998)

OF COUNSEL:
ANNE C. BAKER
JUDITH A. BRESLER
JERROLD B. GOLD
ALBERT GOTTESMAN
ROGER E. KASS
MICHAEL D. REMER
ROBERT F. VAN LIEROP

CORRESPONDENT FIRM:
DONALDSON & HART
9220 SUNSET BLVD. STE. 224
LOS ANGELES, CA 90069
(310) 273-8394

May 25, 2007

*ALSO ADMITTED IN CA & DC
^cALSO ADMITTED IN NJ
*ALSO ADMITTED IN AR & DC

VIA EMAIL (fdehn@sddl.com) AND U.S. MAIL

Francis Dehn, Esq.
SMITH DORNAN & DEHN PC
110 East 42nd Street, Suite 1303
New York, New York 10017

Re: Varquin Enterprises Inc. v. Perry Publications Limited,
07 Cv. 3953 (LBS)

Dear Frank:

As you know, we represent Perry Publications, Ltd. ("Perry"), the owner of all right, title and interest to the registered trademark "BUSINESS TRAVELER" (the "Mark"). Pursuant to the terms of a trademark license agreement dated April 7, 2006, Perry licensed your client Varquin Enterprises Inc. ("Varquin") to use and publish the Mark as the name of a magazine (the "Magazine") pursuant to various terms, including payment of a monthly license fee. Varquin failed to pay its license fee due on April 1, 2007, and 28 days later, according to ¶10.3 of the Agreement, on April 29, 2007, the Agreement automatically terminated according to its terms. Our client confirmed the termination by letter to your client dated May 3, 2007.

According to ¶ 11.1 of the Agreement, Varquin promised that upon termination, Varquin "shall not thereafter publish or authorize the publication of any publication under the title The Business Traveler or including such title or any title confusingly similar to such title." For the first couple of weeks of May, Perry waited to hear from Varquin, as Perry also issued a written invitation to Varquin to explore the possibility of negotiating a new license. Instead, on Thursday, May 17, 2007 you called my colleague Nancy Wolff, ostensibly to confirm that she is U.S. counsel for Perry. When she confirmed that, you informed her that you were planning litigation against Perry, and asked her to meet you in court the next day. Nancy pointed out that you had not even sent her any litigation papers, at which point you agreed to send her early the next day a copy of an Order to Show Cause, and suggested she should meet you in State Court on Tuesday May 22, 2007 at a time to be notified by you.

41 MADISON AVENUE - 34TH FLOOR, NEW YORK, NEW YORK 10010

TEL: (212) 974-7474

FAX: (212) 974-8474

WEB: www.cdas.com

E-MAIL: cdas@cdas.com

Frank Dehn, Esq.
May 25, 2007
Page 2

At the end of the day Friday May 18, 2007, you sent Nancy the papers. As it was already 10 p.m. in London, where our client is based, our client was obviously unavailable.


On Monday May 21, we removed. Since then, we have had several calls about the possibility of negotiating a new license. Those efforts have failed. During one such call, on Tuesday May 22, 2007, you told us for the first time that your client is still in the process of preparing a June edition of the Magazine, and may indeed be starting to ship it shortly. Concerned that unauthorized and infringing copies of Magazines were about to be unleashed, we asked for you to tell us the exact status of that edition, and you agreed to check with your client. The next day, Wednesday, May 23, you said your client refused to confirm the status of the June edition.

It is plain your client is on the brink of issuing an infringing edition of the Magazine bearing and marketed under our client's Mark. Your client's website using the Mark is still active. Such uses of the Mark are not licensed, and are therefore unauthorized and infringing.

Unless you confirm by close of business on Friday, May 25, 2007 that such uses will cease, our client has authorized us to seek immediate injunctive relief. As the Order to Show Cause which you sought in State Court would have amounted to an unconstitutional prior restraining on our client's First Amendment rights of free speech and free association, we will also seek a declaration to that effect, pre-empting any further attempt to prevent our client from exercising its rights concerning the Mark.

Finally, we will expect a complete and accurate accounting of all uses of the Mark by your clients and all those acting in concert with them since April 30, 2007, when Varquin ceased to have any right to use the Mark. This letter is written without prejudice to and without waiver of our client's rights and remedies, all of which are hereby expressly reserved.

Very truly yours,


Toby Butterfield

TMJB/dm

cc: Nancy E. Wolff, Esq.
Mason A. Weisz, Esq.

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This Month's Issue Far and Away

EVIDENCE OF VACATIONS' RESTORATIVE EFFECTS

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last month's issue



On the Cover Miles to Go

Once a month, Intel architect Conor Cahill commutes from his home outside Washington, D.C. to Intel's Oregon campus. He makes quarterly trips to Europe and Asia to represent Intel in a global alliance, and regular visits to Shanghai for meetings with his development team. He easily racks up 175,000 to...more



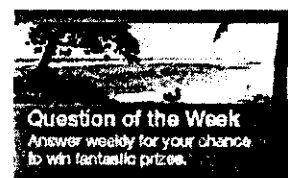
Other Features Drive Time

The 2007 Volkswagen EOS Volkswagen of America's recent invitation to test-drive their newest model held the promise of a reunion with a childhood friend. From rattling around late '60s L.A. in my uncle's VW bus to touring the U.K. in the family Golf during our transplanted years there, my Volkswagen love...more



Golfing Around the World Golfing Around Cannes

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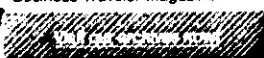
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303 Fifth Avenue, Suite 1306
New York, NY 10016
Main: 212-725-3500 Fax: 212-725-2646

Subscriptions & General Inquiries
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Advertising, Sponsorships & Paid Promotions
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Editorial
editor@btusonline.com

Marketing
marketing@btusonline.com

Charity Auction Inquiries & Donation Submissions
auction@btusonline.com

Director, North America
Adam Rodriguez
tel. 212-725-3955
adam@btusonline.com

Associate Publisher
Lindsay Hirsch
tel. 212-725-2645
lindsay@btusonline.com

Advertising Director
Leah Altman
tel. 212-725-2644
leah@btusonline.com

Advertising Manager
Forrest Hanson
tel. 646-502-7236
forrest@btusonline.com

Editor in Chief
Eva Leonard
eva@btusonline.com

Senior Editor
Alex Féthière
alex@btusonline.com

Editor BT-e
Ally Miola
ally@btusonline.com

Contributing Editor
Susan McKee
susan@btusonline.com

Graphic Designer
Miau-Yee (Mina) Chen
miau-yee@btusonline.com

CEO
Jake Porter
jake@btusonline.com

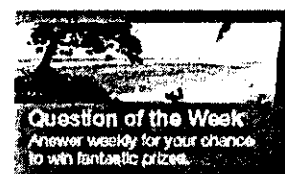
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Julia Rodriguez
tel. 212-725-3500 option 4
julia@btusonline.com

Director of Marketing
James Cavanaugh
jim@btusonline.com

Marketing Assistant
Lindsay Rosenberg
marketing@btusonline.com

Marketing Assistant
Mahitot Arnold
marketing@btusonline.com

Public Relations
Evelyn Galli | BCA Marketing Communications
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Administrative Contact , Technical Contact :

Varquin Enterprises, Inc.
jbcavan@att.net
303 Fifth Avenue #1306
New York, NY 10016
US
Phone: 212-725-3500

Record expires on 10-May-2017
Record created on 10-May-2007
Database last updated on 10-May-2007

Domain servers in listed order:

[Manage DNS](#)

[NS49.WORLDDNIC.COM](#)

[205.178.190.25](#)

[NS50.WORLDDNIC.COM](#)

[205.178.189.25](#)

[Show underlying registry data for this record](#)

Current Registrar: NETWORK SOLUTIONS, LLC.

IP Address: [216.246.62.126](#) (ARIN & RIPE IP search)

IP Location: US(UNITED STATES)-ILLINOIS-CHICAGO

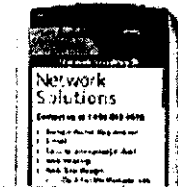
Lock Status: clientTransferProhibited

DMOZ no listings

Y! Directory: [see listings](#)

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btusonline	<input checked="" type="checkbox"/>	.org
btusonline	<input checked="" type="checkbox"/>	.info
btusonline	<input checked="" type="checkbox"/>	.mobi
btusonline	<input checked="" type="checkbox"/>	.biz
btusonline	<input checked="" type="checkbox"/>	.tv
btusonline	<input checked="" type="checkbox"/>	.us
btusonline	<input checked="" type="checkbox"/>	.cc
btusonline	<input checked="" type="checkbox"/>	.bz
btusonline	<input checked="" type="checkbox"/>	.vg
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EXHIBIT G



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This Month's Issue Far and Away

EVIDENCE OF VACATIONS' RESTORATIVE EFFECTS

Last year, a marketing team at Air New Zealand (ANZ) hired former NASA scientists—actually, consultants from a firm, Alertness Solutions, in Cupertino, CA—to study the effects of a vacation to New Zealand on the physical and emotional well-being of ANZ passengers from the U.S. The airline's interest and study dovetail with a growing concern among doctors, stress experts, and travel agents: More and more workers are jettisoning vacations and vacation time in favor of more work. Perhaps the worst offenders are seasoned road warriors, those who travel regularly for work, who find it even easier to put the kibosh on...

This story along with other great features are in the current issue of Business Traveler. Subscribe today to have a copy of Business Traveler delivered to your home or office.

last month's issue



On the Cover Miles to Go

Once a month, Intel architect Conor Cahill commutes from his home outside Washington, D.C. to Intel's Oregon campus. He makes quarterly trips to Europe and Asia to represent Intel in a global alliance, and regular visits to Shanghai for meetings with his development team. He easily racks up 175,000 to... more



Other Features Drive Time

The 2007 Volkswagen EOS Volkswagen of America's recent invitation to test-drive their newest model held the promise of a reunion with a childhood friend. From rattling around late '60s L.A. in my uncle's VW bus to touring the U.K. in the family Golf during our transplanted years there, my Volkswagen love... more



Golfing Around the World Golfing Around Cannes

1 GOLF CLAUX AMICWhere is it? Three miles west of Grasse, 18 miles northwest of Cannes. What's it like? Cut from a magnificent oak forest, 1,968 feet above sea level, Claux Amic is both a welcome escape from the heat of the Riviera and a test of golfing nerve. This... more

tried and tested

Tried & Tested Reviews

Travel is filled with companies claiming to be the biggest, brightest and best. Tried and Tested puts these claims to the test with first hand critiques of real travel experiences. Watch out - sometimes it gets ugly.

4 hr guides



Sightseeing Made Simple

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archives

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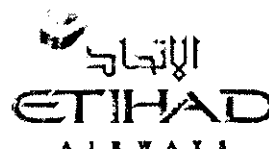


question

Question of the Week

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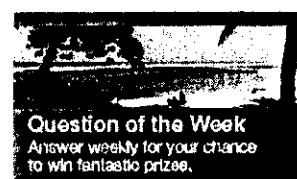


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EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
VARQUIN ENTERPRISES INC., a New York
corporation,

Plaintiff,

-against-

PERRY PUBLICATIONS LIMITED, a United
Kingdom corporation,

Defendant.
----- x

: ECF Case
:
: Civil Action No. 07 Civ. 3953 (LBS)
:
:

COUNTERCLAIMS

: JURY TRIAL DEMANDED
:
:
:
:

Defendant/Counter-claimant Perry Publications Limited ("Perry"), by its undersigned counsel, Cowan, DeBaets, Abrahams & Sheppard LLP, as and for its counterclaims against Plaintiff/Counterclaim Defendant Varquin Enterprises, Inc. ("Varquin"), alleges as follows:

NATURE OF THE CLAIMS

1. Defendant/Counterclaimant Perry is a magazine publisher. Perry publishes a best-selling travel magazine throughout the world under the registered trademark BUSINESS TRAVELLER and/or BUSINESS TRAVELER (depending on the most accurate spelling of the title in the various jurisdictions where it appears. For the purposes of this Complaint, we will refer to the mark as BUSINESS TRAVELER) and BUSINESS TRAVELER INTERNATIONAL (the "Marks," or "Perry's Marks"). Perry brings this action under the United States Trademark Act, 15 U.S.C. § 1 *et al.*, and other laws, for infringement of the Marks, unfair competition, and violation of its other rights, against Plaintiff/Counterclaim Defendant Varquin. By written agreement, Perry had granted to Varquin a limited right to

publish the North American Edition of Business Traveler magazine. The agreement was subject to clear payment provisions, which Varquin failed to meet. Varquin's failure to pay several installments triggered the automatic termination provision of the license. Despite notice of termination, Varquin has prepared for publication and release of an unauthorized post-termination edition of Business Traveler magazine using Perry's Marks, has registered the domain name btusonline.com (short for Business Traveler U.S. Online), and is displaying the Marks and Business Traveler content on a website associated with that name and on www.businesstravelerusa.com. Perry seeks injunctive relief preventing such infringement of its rights in the Marks in the United States, and damages for the harm caused to its business and the Marks' reputation to date and declaratory relief.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the federal claims in this action under 28 U.S.C. §§ 1121, 1331, 1337, and 1338. This Court has subject-matter jurisdiction over the non-federal claims under 28 U.S.C. § 1367, as well as under § 1332 because the amount in controversy exceeds \$75,000 and there is a complete diversity of citizenship.

3. Venue is proper in this district under 28 U.S.C. §1391 because a substantial part of the events or omissions giving rise to the claims occurred and, if not enjoined, will occur in this district, and because plaintiff may be found in this district.

THE PARTIES

4. Defendant/Counterclaimant Perry Publications Limited is a corporation organized under the laws of the United Kingdom, with its principal place of business at Nestor House, Playhouse Yard, London, London, EC4V 5EX, United Kingdom.

5. Upon information and belief, Plaintiff/Counterclaim Defendant Varquin Enterprises Inc. is a corporation organized under the laws of New York, with its principal place of business at 303 Fifth Ave, No. 1306, New York, NY 10016.

6. Varquin has used the Marks on a website and is seeking subscriptions for, advertising, and marketing and threatening to release for publication a magazine bearing the Plaintiff's registered Marks (the "Infringing Magazine") in interstate commerce without the permission or authorization of Perry.

RELEVANT FACTS

Perry Publications Limited

7. Perry has published Business Traveller magazine under the since 1976. The Magazine is the best-selling business travel magazine, and is written for discerning travelling businessperson who seeks an independent view of worldwide travel issues. Either directly or via licenses and joint ventures, Perry publishes numerous editions of Business Traveller magazine. Today there are nine editions: UK and Europe (the "U.K. Edition"), Germany, the Middle East, Asia-Pacific, China, Hungary, Spain, South Africa and Denmark. Collectively, Business Traveller distributes monthly up to 320,000 copies of the various editions of the Magazine throughout the world. Prior to the termination of the U.S. edition in issue in this case, that maximum was well over 500,000. Perry's website www.businesstraveller.com provides up-to-the-minute information on all aspects of travel: airlines, airports, hotels, car rentals and more.

8. The Business Traveller is also world-famous for its annual Business Traveller Awards, a star-studded international competition that recognizes outstanding achievement in business travel. At the awards ceremonies, which take in United States and elsewhere, high-

profile presenters attend and present awards, garnering considerable media attention. Past presenters have included Princess Diana, Sam Donaldson, actress Sarah Jessica Parker, Princess Anne, astronaut Buzz Aldrin, and Queen Rania of Jordan.

9. By reason of many years of phenomenal success of such publications bearing the Marks, the Marks have become famous throughout the United States and abroad as an indicator of high-quality publishing, and constitute an extremely valuable Perry asset.

10. Perry's Marks are registered with the United States Patent and Trademark Office. The mark BUSINESS TRAVELER, Registration Number 1372466 in international class 016 for "magazines and diaries" was issued on November 26, 1985. The mark BUSINESS TRAVELER INTERNATIONAL, Registration Number 1784071 in international class 016 for "informational magazines and associated newsletters and pamphlets aimed at the frequent business traveler" was issued July 27, 1993.

11. Perry is the owner of all right, title, and interest in the Marks.

12. Perry distributes the Magazine bearing the Marks throughout the world and throughout the United States in international and interstate commerce, through exclusive distribution agreements with independent distributors.

13. The marks BUSINESS TRAVELER and BUSINESS TRAVELER INTERNATIONAL have secondary meaning, as the purchasing public has come to know, rely upon and recognize Perry's goods and services by said Marks, and Perry has established valuable good will therein.

Varquin's Infringement of the Mark

14. By agreement dated April 7, 2006 (the "License"), Perry granted to Varquin the limited right to publish the North American Edition of the Magazine, which had previously

been published by another licensee. Under the License, Varquin had the right to incorporate articles and other materials from the U.K. Edition into the North American Edition alongside content generated by Varquin specifically for the North American Edition, subject to both Perry's consent and Varquin's payment for rights to the U.K. Edition material.

15. The payment terms of the License called for a fee of US \$240,000 payable in 24 monthly installments of US \$10,000, commencing on January 1, 2007.

16. The terms also called for quarterly payments of fees for use of material from the U.K. edition.

17. The License also stated the terms under which the license would terminate. Included in these provisions was a clause triggering automatic termination if Varquin failed to make a required payment within 28 days of the due date.

18. On or about January 1, February 1 and March 1, 2007, Varquin timely paid to Perry the monthly license fee instalments of \$10,000 that were due under the License. However, on April 1, 2007, and to date, Varquin has failed to make the subsequent monthly \$10,000 payment due on that date. More than 28 days have passed since that due date.

19. Varquin's failure to make that payment within 28 days alone triggered automatic termination of the License. In addition, the License also terminated by reason of Varquin's failure to make the quarterly payment due on March 31, 2007, as described below.

20. Varquin also failed to pay Perry an installment payment of \$10,000 which was due on May 1, 2007.

21. Of a \$240,000 license fee that Varquin promised to pay Perry, it has only paid \$30,000, leaving an unpaid balance of \$210,000 plus interest.

22. The quarterly payments due to Perry on June 30, 2006, September 30, 2006 and December 30, 2006 were settled. However, Varquin failed to make the payment for the first quarter of 2007, which was due on March 31, 2007. The amount due was \$8,619 and remains unpaid, along with interest accrued under Clause 6.4.

23. On April 29, 2007, 28 days had passed without payment since the March 31, 2007 due date. The License therefore terminated automatically on April 29, 2007.

24. On May 3, 2007, Perry sent a letter to Varquin's director Adam Rodriguez, documenting the termination.

25. On May 5, 2007, Varquin filed an action in New York State Court against Perry seeking (a) injunctive relief declaring that the License between the parties is still in effect, and (b) some type of prior restraint on Perry's ability to communicate with its business partners about the fact that Perry's license agreement with Varquin terminated.

26. On May 21, Perry removed this action from New York State Court.

27. On May 22, counsel for Perry was informed by counsel for Varquin that Varquin intended to release an unauthorized edition of the Magazine bearing Perry's Marks. Upon information and belief, counsel for Varquin disputes having made that admission.

28. Perry has suffered and will continue to suffer damage to its reputation and good will and to the value of the Mark by reason of Varquin's use of the Infringing Mark.

29. Unless restrained by this Court, Perry will suffer irreparable harm.

COUNTERCLAIM I

INFRINGEMENT OF REGISTERED TRADEMARK, 15 U.S.C. § 1114

30. Perry realleges and incorporates by reference the allegations of the preceding paragraphs.

31. Varquin, by continuing to use the Marks after termination of its license, is not an authorized licensee of the Marks. Such continued use constitutes trademark infringement. Perry has been given every indication that Varquin's intentions are to publish an unauthorized version of the magazine set for release in June 2007.

32. On May 22, 2007, counsel for Varquin informed counsel for Perry that Varquin was in the process of preparing a June edition of the Business Traveler magazine, and may indeed be starting to ship it shortly.

33. Further, Varquin continues to use the Marks on the Web page <http://www.businesstravelerusa.com/subscribe.php> in connection with seeking and processing new subscriptions in connection with the anticipated sale, offering for sale, distribution of Infringing Magazine in manners which are likely to cause confusion, mistake, or deception among purchasers and potential purchasers of Infringing Magazine and/or Perry Magazines by causing them to assume or believe that Varquin is an authorized licensee and publisher of Perry's Magazine or that Perry publishes the Infringing Magazines.

34. Despite not being an authorized licensee, Varquin is about to publish, market, sell, and offer for sale an edition of the Magazine in commerce bearing reproductions, copies or confusingly similar derivatives of the registered Marks in manners which are likely to cause confusion, mistake, or deception among purchasers and potential purchasers of Perry magazines by causing them to assume or believe that Varquin is an authorized licensee and publisher of Perry Magazines or that Perry publishes the Infringing Magazine.

35. Varquin's conduct has been and is continuously infringing or threatening to infringe Perry's registered Marks in violation of Section 32 of the Trademark Act, 15 U.S.C. § 1114(1)(a) and (b).

36. Varquin has received repeated proper notice of its termination of license and infringing activity and of Perry's demand that such infringing activity cease but it has refused to cease its infringing activity.

37. Varquin's infringement of the Marks has been and is knowing, willful, intentional, and deliberate.

38. Unless enjoined by the Court, Varquin will release the unauthorized Magazine into the stream of commerce, continue to infringe Perry's trademark rights and cause confusion, mistake, and deception, thereby causing immediate and irreparable injury to Perry.

39. Perry has no adequate remedy at law.

40. Perry is entitled to an injunction restraining Varquin, its agents and employees, and all persons acting in concert with any one or more of them, from engaging in any of the foregoing acts or any further or different acts in violation of Perry's rights under Section 32 of the Trademark Act, 15 U.S.C. § 1117, pursuant to Section 34 of the Act, 15 U.S.C. § 1116.

41. Perry is entitled to an order requiring the seizure and destruction of all infringing magazines, labels, signs, packages, advertisements, negatives, galleys, or other materials that violate plaintiff's rights under Section 32 of the Trademark Act, 15 U.S.C. § 1117, pursuant to 15 U.S.C. § 1118.

42. Perry has suffered and will suffer damages as a proximate result of the infringing acts of Varquin and is entitled to recover damages in an amount to be determined at trial, and is further entitled to recover any profits of Varquin resulting from its acts of infringement, along with treble damages, statutory damages, costs, and reasonable attorneys' fees, pursuant to 15 U.S.C. § 1117.

COUNTERCLAIM II

**FALSE DESIGNATION OF ORIGIN, FALSE ADVERTISING AND UNFAIR
COMPETITION UNDER SECTION 43(a) OF THE LANHAM ACT, 15 U.S.C. § 1125(a)**

43. Perry realleges and incorporates by reference the allegations of the preceding paragraphs.

44. The Marks have secondary meaning, as the purchasing public has come to know, rely upon and recognize Perry's goods and services by Marks, and Perry has established valuable good will therein.

45. Varquin intends to manufacture, market, sell, and offer for sale Infringing Magazine in commerce bearing reproductions, copies or confusingly similar derivatives of the registered Mark in manners which are likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of such Varquin with Perry, or as to the origin, sponsorship, or approval of Varquin's goods, services, or commercial activities by Perry among purchasers and potential purchasers of Infringing Magazines and/or Perry's Magazine by, inter alia, causing them to assume or believe that Varquin is an authorized publisher of Perry Magazines, is subject to the duties and obligations of an authorized seller of Perry Magazine's, and can remedy any customer complaints regarding Perry Magazine's.

46. In commercial advertising or promotion, Varquin has misrepresented the nature, characteristics, qualities, and, upon information and belief, geographic origin, of its and Perry's goods, services, or commercial activities, which constitutes false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

47. Varquin's actions constitute false designations of the origin of Infringing Magazines, and false or misleading descriptions of Varquin's status as a seller of Perry's Magazine and vice versa, which are likely to cause confusion, mistake, or deception among

consumers of the Magazine as to Varquin's supposed affiliation, connection, or association with Perry, and to give the false or misleading impression as to the origin, sponsorship, or approval of Varquin's unauthorized sale, offering for sale, advertising or promotion of Infringing Magazines, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

48. Varquin has received repeated proper notice of its infringing activities and of Perry's demand that such infringing activities cease, but it has refused to cease its infringing activities.

49. Varquin's violations of Section 43(a) of the Lanham Act have been and are knowing, willful, intentional, and deliberate.

50. Unless enjoined by the Court, Varquin will continue to infringe Perry's rights and to cause confusion, mistake, and deception, thereby causing immediate and irreparable injury to Perry.

51. Perry has no adequate remedy at law.

52. Perry is entitled to an injunction restraining Varquin, its agents and employees, and all persons acting in concert with any one or more of them, from engaging in any of the foregoing acts or any further or different acts in violation of Perry rights under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), pursuant to Section 34 of the Act, 15 U.S.C. § 1116.

53. Perry is entitled to an order requiring the seizure and destruction of all infringing magazines, labels, signs, packages, advertisements, negatives, galleys, or other materials that violate plaintiff's rights under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), pursuant to 15 U.S.C. § 1118.

54. Perry has suffered and will suffer damages as a proximate result of the infringing acts and anticipated infringing acts of Varquin and is entitled to recover damages in an amount

to be determined at trial, and is further entitled to recover any profits of Varquin resulting from its acts of infringement, along with treble damages, statutory damages, costs, and reasonable attorneys' fees, pursuant to 15 U.S.C. § 1117.

COUNTERCLAIM III

COMMON LAW TRADEMARK INFRINGEMENT

55. Plaintiff realleges and incorporates by reference the allegations of the preceding paragraphs.

56. The Marks have secondary meaning, as the purchasing public has come to know, rely upon and recognize Perry's goods and services by Marks, and Perry has established valuable good will therein.

57. Varquin's conduct has and threatens to continue to cause confusion, mistake, and/or deception in the minds of the members of the trade and the public, including distributors, retailers, and consumers of the Magazine and the Infringing Magazine bearing the Marks and/or marks confusingly similar thereto.

58. Varquin's conduct, through its unauthorized use and anticipated unauthorized use of the Marks and/or marks confusingly similar thereto including the mark BUSINESS TRAVELER, is an infringement of and trades upon the favorable reputation and proprietary rights of Perry under the common law of New York.

59. Varquin's infringements have been and are knowing, willful, intentional, and deliberate and cause harm to the trade and the public at large.

60. Unless enjoined by the Court, Varquin will continue to infringe Perry's rights and to cause confusion, mistake, and deception, thereby causing immediate and irreparable injury to Perry.

61. Perry has no adequate remedy at law.

62. Perry is entitled to an injunction restraining Varquin, its agents and employees, and all persons acting in concert with any one or more of them, from engaging in any of the foregoing acts or any further or different acts in violation of Perry's rights.

63. Perry is entitled to an order requiring the seizure and destruction of all infringing magazines, labels, signs, packages, advertisements, negatives, galleys, or other materials that violate Perry's rights.

64. Perry has suffered damages as a proximate result of the infringing acts of Varquin and is entitled to recover damages in an amount to be determined at trial.

65. Perry is entitled to recover punitive damages in an amount to be determined at trial.

COUNTERCLAIM IV

COMMON LAW UNFAIR COMPETITION

66. Plaintiff realleges and incorporates by reference the allegations of the preceding paragraphs.

67. The Marks have secondary meaning, as the purchasing public has come to know, rely upon and recognize Perry's goods and services by Marks, and Perry has established valuable good will therein.

68. Varquin's conduct constitutes misappropriation of the goodwill created and developed by Perry in its business and the Marks and Perry's status as the source of the Magazine in the United States.

69. Varquin's acts of unfair competition have been and are knowing, willful, intentional, and deliberate and cause harm to the trade and the public at large.

70. Unless enjoined by the Court, Varquin will continue to engage in unfair competition in violation of Perry's rights and to cause confusion, mistake, and deception, thereby causing immediate and irreparable injury to Perry.

71. Perry has no adequate remedy at law.

72. Perry is entitled to an injunction restraining Varquin, its agents and employees, and all persons acting in concert with any one or more of them from engaging in any of the foregoing acts or any further or different acts in violation of Perry's rights.

73. Perry is entitled to an order requiring the seizure and destruction of all infringing magazines, labels, signs, packages, advertisements, negatives, galleys, or other materials that violate Perry's rights.

74. Perry has suffered damages as a proximate result of the infringing acts of Varquin and is entitled to recover damages in an amount to be determined at trial.

75. Perry is entitled to recover punitive damages in an amount to be determined at trial.

COUNTERCLAIM V

VIOLATION OF GENERAL BUSINESS LAW § 360-I

76. Plaintiff realleges and incorporates by reference the allegations of the preceding paragraphs.

77. The Marks have secondary meaning, as the purchasing public has come to know, rely upon and recognize Perry's goods and services by Marks, and Perry has established valuable good will therein.

78. Varquin's foregoing forgoing acts create a likelihood of injury to plaintiffs' business reputation and dilution of the distinctive quality of the Marks or unfair competition in violation of New York General Business Law § 360-1.

79. Varquin's foregoing acts were in knowing and willful violation of New York General Business Law § 360-1.

80. Perry has been injured by Varquin's violations of New York General Business Law § 360-1.

81. Unless enjoined by the Court, Varquin will continue to violate New York General Business Law § 360-1, thereby causing immediate and irreparable injury to Perry.

82. Perry has no adequate remedy at law.

83. Perry is entitled to an injunction restraining Varquin, its agents and employees, and all persons acting in concert with any one or more of them, from engaging in any of the foregoing acts or any further or different acts in violation of New York General Business Law §§ 360-1.

COUNTERCLAIM VI
DECLARATORY JUDGMENT -- 28 U.S.C. §§ 2201 ET SEQ.

84. Plaintiff realleges and incorporates by reference the allegations of the preceding paragraphs.

85. The parties have an actual controversy as to whether Varquin's license was terminated, thereby voiding its rights to use the Marks.

86. Perry seeks a declaration that (i) Varquin's License automatically terminated by April 29, 2007 pursuant to Clause 10.3 of the License; (ii) Varquin has no right to use the Marks

in any current or future publication, online, or elsewhere; and (iii) continued use of the Marks by Varquin, its agents, employees, assigns and licensees infringes Perry's rights in the Marks.

WHEREFORE, Defendant/Counterclaimant Perry respectfully requests that the Court grant its request for relief as follows:

A) Granting a preliminary injunction ordering that Varquin and its officers, agents, representatives, servants, employees, attorneys, successors and assigns, and all others in active concert or participation with defendants, be enjoined and restrained from:

- a) imitating, copying, or making any other infringing use of the Marks or hereafter creating a North American edition of the Magazine utilizing a confusingly similar title;
- b) imitating, copying, or making any other infringing use or infringing publication or distribution of magazines using the Marks;
- c) manufacturing, assembling, producing, distributing, broadcasting, offering for distribution or broadcast, circulating, selling, offering for sale, advertising, importing, promoting, or displaying any book, television program, website, magazine or related merchandise or service bearing any of the Marks or any mark that is confusingly similar thereto;
- d) using any simulation, reproduction, counterfeit, copy, or colorable imitation of the Marks in connection with the manufacture, assembly, production, distribution, broadcast, offering for distribution or broadcast, circulation, sale, offering for sale, import, advertisement, promotion, or display of any book, television program, website, magazine or related merchandise or service not authorized or licensed by Perry;
- e) using any designation of origin or description which can or is likely to lead anyone to believe that any book, television program, website, magazine or related merchandise or service has been produced, manufactured, assembled, distributed, broadcast, offered for distribution or broadcast, circulation, sold, offered for sale, imported, advertised, promoted, displayed, licensed, sponsored, approved, or authorized by Perry, when such is not true in fact;
- f) using reproductions, counterfeits, copies or colorable imitations of the Marks or the Magazine or the articles presented in authorized editions of the Magazine in the distribution, broadcast, offering for distribution or broadcast, circulating, sale, offering for sale, advertising, importing, promoting, or displaying of any goods or services of Varquin;

- g) engaging in any other activity constituting an infringement of any of Perry's trademarks; and
- h) assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (a) through (g) above.

B) Issuing a declaratory judgment finding as follows:

- a) Varquin's License was terminated by April 29, 2007 pursuant to Clause 10.3 of the License;
- b) Varquin has no right to use the Marks in any current or future publication, online, or elsewhere;
- c) continued use of the Marks by Varquin, its agents, employees, assigns and licensees infringes Perry's rights in the Marks.

DEMAND FOR JURY TRIAL

Perry respectfully demands trial by jury of all claims so triable.

Dated: New York, New York
May 31, 2007

COWAN, DEBAETS, ABRAHAMS & SHEPPARD LLP

By: 

Toby M.J. Butterfield (PB-8599)

By: 

Mason A. Weisz (MW-5954)

41 Madison Avenue, 34th Floor
New York, New York 10010
Telephone: (212) 974-7474
Telecopier: (212) 974-8474

Attorneys for Perry Publications Limited